(10)

No. 03-1696

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, EXXON CHEMICAL ARABIA, INC., AND MOBIL YANBU PETROCHEMICAL COMPANY, INC.,
Petitioners,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 22, 2004
CERTIORARI GRANTED OCTOBER 12, 2004

TABLE OF CONTENTS

	Page
Relevant Docket Entries in Case No. 2:98-cv-04897-WHW-SDW	1
Relevant Docket Entries in Case No. 2:00-cv-03841-WHW	3
Relevant Docket Entries in the Court of Appeals	7
December 8, 2003 Letter from Court of Appeals	17
Excerpt from Transcript of Oral Argument December 9, 2003	18
ExxonMobil's Letter Brief of December 18, 2003	48
SABIC's Letter Brief of December 18, 2003	59

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY [LIVE]
(NEWARK)

Case No. 2:98-cv-04897-WHW-SDW

Saudi Basic *et al.*,

v.

Exxon Corporation, et al.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/03/2002	—	Comsolidated Lead Case (jd) (Entered: 04/03/2002)
04/03/2002	114	Amended OPINION (signed by Judge William H. Walls) (NM) (jd) Modified on 04/03/2002 (Entered: 04/03/2002)
04/22/2002	119	NOTICE OF APPEAL filed at (recvd 4:50 pm. dropbox) by (counsel for dft) SAUDI BASIC INDUSTRI Re: [113-1] order, [114-1] order, [112-1] order. Fee Status: $105.00; Receipt No. 307490. Copies notice of appeal sent to Clerk, USCA and Attorney(s): JEFFREY WARREN LORELL, ELIZABETH J SHER (DS) (Entered: 04/23/2002)
04/25/2002	120	Notice of MOTION to stay pending appeal by SAUDI BASIC, Motion set for 5/28/02 on [120-1] motion w/cert of service (Brief/PO Subm) (jd) (Entered: 04/26/2002)
05/03/2002	—	USCA recvd appeal packet 4/25/02 (DS) (Entered: 05/06/2002)
05/03/2002	127	NOTICE of Docketing ROA from USCA Re: [119-1] appeal USCA NUMBER: 02-2130 (DS) (Entered: 05/06/2002)

DATE	NO.	PROCEEDINGS
06/06/2002	140	ORDER granting [120-1] motion to stay pending appeal; denying SABIC's motion for reconsideration of that portion of this Court's 4/3/02 Amended Opinion, etc.; granting ExxonMobil's motion to enforce the 3/10 Stipulation, etc.; denying SABIC's motion for a stay of the 'overcharge'-related defenses, etc. (signed by Judge William H. Walls) (NY) (jd) (Entered: 06/07/2002)
06/17/2002	—	USCA recvd record on appeal 5/20/02 (DS) (Entered: 06/19/2002)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY [LIVE]
(NEWARK)

Case No. 2:00-cv-03841-WHW

EXXON MOBIL CORPORATION, *et al.*,
Plaintiff,

v.

SAUDI BASIC INDUSTRIES CORPORATION,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/08/2000	1	COMPLAINT filed; jury demand FILING FEE $ 150.00 RECEIPT # 283658 (JB) (Entered: 08/09/2000)
08/08/2000	2	NOTICE of Allocation and Assignment filed. Magistrate Judge SUSAN DAVIS (JB) (Entered: 08/09/2000)
08/09/2000		SUMMONS(ES) issued for SAUDI BASIC INDUSTRI (20 Days) (Mailed to Counsel) (JB) (Entered: 08/09/2000)
08/21/2000	3	Notice of MOTION to dismiss complt. & for other relief by SAUDI BASIC INDUSTRI, Motion set for 9/25/00 on [3-1] motion w/cert of service. (Brief/PO Subm) (sr) (Entered: 08/22/2000)
08/21/2000	4	DECLARATION of Donald E. Reid, Esq. Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)

DATE	NO.	PROCEEDINGS
08/21/2000	5	DECLARATION of Dr. Abdulrahman S. Al-Ubaid Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)
08/21/2000	6	DECLARATION of Jeffrey W. Lorell, Esq. on behalf of SAUDI BASIC INDUSTRI Re: [3-1] motion to dismiss complt. & for other relief (sr) (Entered: 08/22/2000)
09/22/2000	7	AMENDED COMPLAINT by EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE, amending [1-1] complaint; w/cert of service. (sr) (Entered: 09/25/2000)
09/25/2000	9	AFFIDAVIT of Elizabeth J. Sher * * * (sr) (Entered: 09/27/2000)
09/29/2000	10	Notice of MOTION to consolidate cases 00-cv-3841 w/98-cv-4897 by EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE, Motion set for 10/23/00 on [10-1] motion w/cert of service. (Brief/PO sub) (sr) (Entered: 10/02/2000)
09/29/2000	11	AFFIDAVIT of Elizabeth J. Sher, Esq. on behalf of EXXON MOBIL CORPORAT, EXXON CHEMICAL ARABI, MOBIL YANBU PETROCHE Re: [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (sr) (Entered: 10/02/2000)
10/10/2000	12	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 10/10/00; The following actions were taken, at call for [3-1] motion to dismiss complt. & for other relief taken under advisement, purs to Rule 78 By Judge William H. Walls (sr) (Entered: 10/12/2000)

DATE	NO.	PROCEEDINGS
10/20/2000	16	COPY OF DECLARATION of Marc C. Singer, Esq. on behalf of SAUDI BASIC INDUSTRI Re: in opposition to [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (original fld. in cv-98-4897) (sr) (Entered: 10/23/2000)
10/20/2000	17	DECLARATION of Dr. Abdulrahman S. Al-Ubaid on Re: [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 (sr) (Entered: 10/23/2000)
10/20/2000	18	DECLARATION of Mohammad Al-Bat'hi iin support of Saudi Basic's motion to dismiss (sr) (Entered: 10/23/2000)
10/27/2000	22	DECLARATION of Marc C. Singer, Esq. on behalf of SAUDI BASIC INDUSTRI Re: motion to dismiss (sr) (Entered: 10/30/2000)
02/08/2001	28	Notice of MOTION to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. by SAUDI BASIC INDUSTRI, Motion set for 3/12/01 on [28-1] motion w/cert of service. (Brief/PO Subm) (sr) (Entered: 02/09/2001)
02/08/2001	29	DECLARATION of Jeffrey W. Lorell, Esq. on behalf of SAUDI BASIC INDUSTRI Re: [28-1] motion to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. (sr) (Entered: 02/09/2001)
02/26/2001	30	DECLARATION of David Lender, Esq. (brief sub) (fld. under seal) (sr) (Entered: 02/27/2001)

DATE	NO.	PROCEEDINGS
03/12/2001	32	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 03/12/01; The following actions were taken, [28-1] motion to stay all pre-trial proceedings pending final decision on Motion to Dismiss Amended Complt. taken under advisement; purs to Rule 78 By Judge William H. Walls (sr) (Entered: 03/14/2001)
04/03/2002	33	OPINION fld. (signed by Judge William H. Walls) (sr) (Entered: 04/03/2002)
04/03/2002	34	ORDER granting [10-1] motion to consolidate cases 00-cv-3841 w/98-cv-4897 denying [3-1] motion to dismiss complt. & for other relief (signed by Judge William H. Walls) (NM) (sr) (Entered: 04/03/2002)
04/03/2002		Case closed (sr) (Entered: 04/03/2002)
04/03/2002		Consolidated Member Case. Lead Case Number: 2cv98 4897 (sr) (Entered: 04/03/2002)
04/19/2004	35	USCA OPINION. (ce,) (Entered: 04/27/2004)
04/19/2004	36	Judgement of USCA vacating USDC order of April 3, 2002, and dismissing appeal for lack of subject matter jurisdiction. Costs taxed in favor of appellant Saudi Basic Industries Corporation in the sum amount of $903.24 (USCA# 02-2130). (ce,) (Entered: 04/27/2004)
04/29/2004	37	ORDER Amending Published Opinion filed March 24, 2004 (USCA# 02-2130). (ce,) (Entered: 05/10/2004)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2130

EXXON MOBIL CORPORATION, *et al.*,
Appellees,

v.

SAUDI BASIC INDUSTRIES *et al.*,
Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/26/02	CIVIL CASE DOCKETED. Notice filed by Saudi Basic Industries Corporation. □ (tlw) [02-2130]
6/14/02	Certified copy of order dated 6/6/02, (Walls,DJ) denying SABIC's motion for reconsideration of that portion of this Court's April 3, 2002 Amended Opinion, denying SABIC's motion to clarify and/or reform the March 10 Stipulation and finding that SABIC has breached the March 10 Stipulation. Exxon Mobil's motion to enforce the March 10 Stipulation is granted, and SABIC shall fully comply with the terms of the March Stipulation, which are incorporated herein by reference. SABIC's motion for a stay of Case No. 00 3841 pending appeal of that portion of the 4/3 Opinion denying SABIC's motion to dismiss the claims in Case No. 00-3841, being unopposed, is granted. SABIC's motion for stay of the "overcharge"-related defenses in case no.98-4897 is denied, filed. (tlw) [02-2130]

DATE	PROCEEDINGS
4/28/03	ORDER (Clerk) on April 22, 2002, SABIC filed a notice of appeal from the order of the District Court denying SABIC's motion to dismiss the complaint under the Foreign Sovereign Immunities Act. On June 21, 2002, SABIC filed a notice of appeal from the order of the District Court entered June 7, 2002. It appears that this notice of appeal was erroneously construed as an amended notice of appeal. As such it is hereby O R D E R E D that the "amended notice of appeal" shall be docketed as a separate notice of appeal at No. 03-2201. The entries of appearance and disclosure statements filed in No. 02-2130 shall be deemed filed in No. 03-2201. Appellee Exxon Mobil Corporation filed a Motion for Dismissal of Appeal for want of Appellate Jurisdiction or in the alternative for Partial Summary Affirmance. As this motion related only to SABIC's appeal of the June 7, 2002 order, the motion shall be construed as a Motion to Dismiss the appeal at No. 03-2201 or in the Alternative for Summary Affirmance and shall be docketed in appeal No. 03-2201, only. Likewise Appellee Exxon's Brief in Support of the Motion, Appendix in Support of the Motion, Unopposed Motion to Maintain Filings Under Seal, SABIC's Oppostion to the Motion, SABIC's Unopposed Motion to Maintain Filings Under Seal, SABIC's Corrected Page 4, Appellee's Reply Brief, and Appellee's Unopposed Motion to Maintain Reply Brief Under Seal, shall all be deemed filed in appeal No. 03-2201. The Clerk shall hold these

DATE	PROCEEDINGS
	documents as docketed in No. 03-2201 under seal pursuant to the unopposed motions by the parties pending final decision by the Court. With respect the submission of the appeal at No. 02-2130 for dismissal due to a jurisdictional defect, after review of the jurisdicational response and at the direction of the Court the matter will not be submitted for possible dismissal. See Federal Insurance Co. v. Richard Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993). A briefing and scheduling order shall be issued in No. 02-2130. Any objection to this order shall be filed within 10 days from the date of this order, filed. (nmb) [02-2130]
6/9/03	BRIEF/APPENDIX (vol 1 attached) on behalf of Appellant Saudi Basic Ind in 02-2130. Pages: 54, Copies: 10, Word Count: 12,426, Delivered by hand, filed. Certificate of service date 6/9/03. [SEALED—See Court's Order dated 3/25/04] (gpk) [02-2130]
7/8/03	BRIEF with attachment on behalf of Appellees 02-2130. Pages: 50. Copies: 10, Word Count: 12,235, Delivered by mail, filed. Certificate service date 7/8/03. [SEALED—See Court's Order dated 3/25/04] (gpk) [02-2130]
7/9/03	MOTION by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. to stay consideration of appeal pending outcome of related proceedings, filed. Answer due 7/21/03. Certificate of Service dated 7/8/03. (ghb) [02-2130]

DATE	PROCEEDINGS
7/22/03	RESPONSE by Appellant Saudi Basic Ind in Opposition to Motion by Appellees to Stay Condiseration of Appeal, received. Certificate of service dated 7/21/03. (nmb) [02-2130]
7/25/03	REPLY BRIEF/w Attachments on behalf of Appellant Saudi Basic Ind in 02-2130. Copies: 10, Delivered by mail, filed. Certificate of service dated, 7/25/03. [SEALED—See Court's Order dated 3/25/04] (gas) [02-2130]
7/31/03	REPLY BRIEF by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. in further Support of motion to stay consideration of appeal pending outcome of related proceedings, filed. Certificate of service dated 7/30/03. (ghb) [02-2130]
8/5/03	ORDER (Sloviter, Authoring Judge, and McKee, Circuit Judges) granting motion by Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. to stay consideration of appeal pending outcome of related proceedings in the Superior Court for the State of Delaware in and for New Castle County, filed. A-125 (ghb) [02-2130]
8/5/03	Certified copy of order to Lower Court. (ghb) [02-2130]
10/20/03	CALENDARED for Tuesday,—December 9, 2003. (clr) [02-2130]

DATE	PROCEEDINGS
10/24/03	CLERK'S LETTER to counsel written at the direction of the Court requesting that the parties advise this office in writing within 10 days of the date of this letter of the status of the related proceedings in the Superior Court for the State of Delaware in and for New Castle County. Until this matter is resolved, counsel should notify this office every 30 days in writing of the status of the this appeal, filed. Status Report Due 11/3/03. (ghb) [02-2130]
10/24/03	MOTION by Appellant Saudi Basic Industries Corporation to lift the stay imposed on August 5, 2003 by a two-judge motions panel of this Court so that oral argument in this case can proceed in tandem with argument at No. 03-2201 which is scheduled to be heard by a panel of this Court on December 9, 2003, filed. Answer due 11/3/03. Certificate of Service dated 10/24/03. (ghb) [02-2130]
10/28/03	ORDER (Clerk), It is hereby ordered that Exxon Mobil Corporation file a response to SABIC's motion to lift the stay within 5 days from the date of this order. In particular, Exxon should address whether there are common issues in *Sabic v. Exxon*, No. 02-2130 and *Sabic v. Exxon*, No. 03-2201 which would lend the cases to be decided by a single panel, filed. (ghb) [02-2130]
10/31/03	RESPONSE by Appellees Exxon Mobil Corporation, Exxom Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc. in Opposition to MOTION by Appellant Saudi Basic Industries Corporation to lift stay, filed. Certificate of Service dated 10/30/03. (ghb) [02-2130]

DATE	PROCEEDINGS
11/3/03	STATUS REPORT from Andrew S. Pollis, Esq.,\counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that on September 2, 2003, the trial court issued its last in a series of rulings on SABIC's post-trial motions. On October 1, 2003, SABIC filed a notice of appeal to the Supreme Court of Delaware, docketed as Case No. 493, 2003. On October 3, 2003, the Clerk of that court set a briefing schedule under which SABIC's opening brief is due on or before November 17, 2003; Exxon Mobil's answering brief is due 30 days after service of SABIC's opening brief and SABIC's reply brief is due 15 days after service of Exxon Mobil's answering brief, received. Next Status Report Due 12/3/03. (ghb) [02-2130]
11/3/03	REPLY by Appellant Saudi Basic Ind TO RESPONSE by Appellees to Appellant's Motion to Lift Stay of Appeal, filed. Certificate of service dated 11/3/03. (nmb) [02-2130]
11/4/03	STATUS REPORT from Gregory A. Castanias, Esq., counsel for Appellant Saudi Basic Industries, Inc., advising that the proceedings in the Superior Court for the State of Delaware are now complete and a final judgment has been entered. The Delaware Action is now on appeal to the Delaware Supreme Court. Appellant SABIC filed a notice of appeal with the Delaware Supreme COurt on October 1, 2003, and SABIC's opening brief is due November 17, 2003. Thereafter, Appellee Exxon Mobil must file a response no later than December 17, 2003,

DATE	PROCEEDINGS
	with SABIC's reply brief due two weeks later on January 2, 2004. At present, the Delaware Supreme Court has not scheduled oral argument, received. Next Status Report Due 12/3/03. (ghb) [02-2130]
11/12/03	ORDER (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges) granting the motion by Appellant Saudi Basic Industries Corporation to lift stay of appeal. The stay imposed by the Court Order entered August 5, 2003 is hereby dissolved. It is further ordered that the appeals at Nos. 02-2130 and 03-2201 are consolidated for disposition. The cases will remain calendared for disposition on December 10, 2003, filed. (nmb) [02-2130 03-2201]
12/3/03	Letter dated 12/2/03 from Andrew S. Pollis, Esq., counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that the briefing schedule in the Supreme Court of Delaware has now been deferred while that court entertains various motions filed by Saudi Basic Industries Corporation, received for the information of the Court. (ghb) [02-2130]
12/8/03	CLERK'S LETTER to counsel written at the direction of the Court, please be prepared to address the following issues at oral argument. 1. Whether the District Court has juris liction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court? 2. Whether the District Court should apply the Colorado River Abstention Doctrine to

DATE	PROCEEDINGS
	this case, and either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor? (eh) [02-2130 03-2201]
12/9/03	ARGUED Tuesday, December 9, 2003 Panel: Ambro, Fuentes and Chertoff, Circuit Judges. Counsel for Appellant: Gregory A. Castanias and Counsel for Appellees: James W. Quinn. (clr) [02-2130 03-2201]
12/9/03	COURT RESPONSE REQUEST AT ORAL ARGUMENT. Court directed counsel to file memoranda addressing various issues. Response due by Friday, December 19, 2003. (clr) [02-2130 03-2201]
12/18/03	A copy of the Transcript of the oral argument held Tuesday, December 9, 2003, received from William K. Shirey, Esq., in the a capacity of liaison counsel (for the purposes of filing the transcript), in the above-referenced matter, prepared at the direction of the Court. (clr) [02-2130 03-2201]
12/19/03	ANSWER/Letter brief dated December 18, 2003, received from Gregory A. Castanias, Esq., counsel for Appellants/Cross Appellee, addressing various issues submitted in direct response to the Court's at oral argument on Tuesday, December 9, 2003, filed. (clr) [02-2130 03-2201]
12/19/03	ANSWER/Letter brief dated December 18, 2003, received from James W. Quinn, Esq., counsel for Appellees/Cross Appellants, addressing various issues, submitted in direct response to the Court's at oral argument on Thursday, December 11, 2003. (clr) [02-2130 03-2201]

DATE	PROCEEDINGS
2/5/04	Letter dated 2/4/04 from Andrew S. Pollis, Esq., counsel for Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc. and Mobil Yanbu Petrochemical Company, Inc., advising that the Delaware Supreme Court issued an order on January 29, 2004 denying the various motions filed by Saudi Basic Industries Corporation, effectively establishing a new briefing schedule. Under the new schedule, all of the briefing in Delaware is to completed by March 23, 2004, received for the information of the Court. (ghb) [02-2130]
3/24/04	PUBLISHED PRECEDENTIAL REPORTED OPINION (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges), filed. (ghb) [02-2130]
3/24/04	JUDGMENT: VACATED and DISMISSED for lack of subject matter jurisdiction. Costs taxed against Appellees, filed. (ghb) [02-2130]
4/15/04	MANDATE ISSUED, filed. (03-2201) (ghb) [02-2130]
4/27/04	ORDER AMENDING PUBLISHED OPINION (Ambro, Authoring Judge, Fuentes and Chertoff, Circuit Judges), filed. (ghb) [02-2130]
4/27/04	Certified copy of order to Lower Court. (ghb) [02-2130]
6/28/04	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellees. Filed in the Supreme Court on 6/22/04 at Supreme Ct. case number: 03-1696. (mgd) [02-2130]

DATE	PROCEEDINGS
10/18/04	U.S. Supreme Court order dated 10/12/04, at S.C. number: 03-1696 granting petition for writ of certiorari by Appellees Exxon Mobil, Exxon Chem Arabia and Mobil Yanbu, filed. (jht) [02-2130]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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Via Facsimile and Regular Mail

December 8, 2003

Gregory A. Castanias, Esq.
Elizabeth J. Sher, Esq.
Andrew S. Pollis, Esq.

Re: Saudi Basic Industries Corp., et al. v. Exxon Corporation, et al. Nos. 02-2130/2201

Dear Counsel:

At the directed of the Court, please be prepared to address the following issues at oral argument.

1. Whether the District Court has jurisdiction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court?

2. Whether the District Court should apply the Colorado River Abstention Doctrine to this case, and either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor?

Very truly yours,
MARCIA M. WALDRON, Clerk

/s/ Eric Hernandez
By: Eric Hernandez, Calendar Clerk
Direct Dial: (267) 299-4956

COPY OF TRANSCRIPT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2130/03-2201

SAUDI BASIC INDUSTRIES CORPORATION, Individually, And In The Name of, And On Behalf Of; AL-JUBAIL PETROCHEMICAL COMPANY, A Partnership

v

EXXON MOBIL CORPORATION
(D.C. No. 98-cv-04897)

EXXON MOBIL CORPORATION; EXXON CHEMICAL ARABIA, INC.; MOBIL YANBU PETROCHEMICAL COMPANY, INC.

v

SAUDI BASIC INDUSTRIES CORPORATION
(D.C. No. 00-cv-03841)

Appellant

Transcript from the audio tapes of the oral argument held Tuesday, December 9, 2003, at the United States Court House, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court, and Notary Public.

BEFORE:

The Honorable Thomas L. Ambro, The Honorable Julio M. Fuentes, The Honorable Michael Chertoff

Appearances:

Gregory A. Castanias, Esquire
Jones Day
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Washington, D.C. 20001

Counsel for Appellant

James W. Quinn, Esquire
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, N.Y. 10153

Counsel for Appellees

THE COURT: Last case for today is numbers 02-2130 and 03-2201, Saudi Basic Industries, et al v Exxon Corporation and Exxon Mobil Corporation, et al.

Now we have Mr. Castanias, am I pronouncing that correctly?

MR. CASTANIAS: Exactly right, your Honor.

THE COURT: Every now and then you get them. And Mr. Quinn. I got Quinn.

Let's deal with the waiver case first. And you, I think, have both received a letter from the Court asking you to address how it is that the *Rooker-Feldman* doctrine does not or does apply, as well as the abstention doctrine. So if you would deal with that first, please.

MR. CASTANIAS: Thank you, your Honor. May it please the court, Greg Castanias for SABIC, the appellant in both cases, and I wish to reserve three minutes for rebuttal.

THE COURT: Granted.

MR. CASTANIAS: Turning to the questions raised by the Court with regard to number 02-2130, the Foreign Sovereign

Immunities Act appeal, the court has asked two questions. The first is with respect to Colorado River abstention.

The court will note that the district court was asked to abstain under the Colorado River doctrine and denied that motion on the ground that it could find no substantial federal interest in doing so.

But what is important to note at this point—

THE COURT: Normally under—if you deal with Colorado River, I've got about eight factors you take into account: Whether you have the lack of substantial proceedings in Federal Court when this federal action was filed, and the answer would be, would appear to be yes.

Second is the dominance of state law issues, and these are contract claims, which appear to be state law issues.

Third is the government's participation in other state proceedings, which is not applicable here.

Fourth is the geographic location of the Federal Court, which doesn't appear to be an apparent concern.

Fifth is the need to avoid piecemeal litigation. And that would at least seem to weigh in favor of abstention, in light of what was going on in Delaware.

Sixth was the order in which the jurisdiction was obtained by concurrent forums. And obviously the state court action was filed first.

Seventh was the presence of federal law issues. I don't know of any.

And lastly, the probable inadequacy of the state court proceeding to protect a party's right, which appears that the state court proceeding on the overcharge issue could protect parties' rights, or else you wouldn't have participated in Delaware. So I'm lost as to why the court wouldn't have abstained here.

MR. CASTANIAS: Well, I think—first of all, we did make a motion for abstention, and so we sought abstention at the time. But it's important to understand that that motion was made in August of 2000.

The court did not decide this issue until April of 2002. When the district judge in this case had the briefing in front of him on Colorado River abstention, the Delaware case was at an incipient stage, there had been no counterclaims filed as of yet. In fact, the counterclaims that ultimately led to the large judgment in favor of Exxon/Mobil in Delaware did not get filed until January of 2002. And those, to the best of my reading of the record, were not in front of the judge when he made his Colorado River ruling.

What's happened since that ruling, and there's been a delay in this case because of an administrative snafu in the clerk's office, what's happened since April of 2002 is that the Delaware case has in fact proceeded to judgment, and it's now on appeal.

So there was no *Rooker-Feldman* issue that was briefed or addressed at the time that the Colorado River abstention motion was made. But now Colorado River abstention would be significant for the district—I'm sorry.

THE COURT: Was the Delaware action actually filed on what, July 4th of 2000?

MR. CASTANIAS: It's somewhere around that time is my recollection.

THE COURT: I mean you can file 365 days a year in superior court. It sounds like there was a budding dispute and the other side wished to—or actually you filed in Delaware; is that correct?

MR. CASTANIAS: Right. We filed a declaratory judgment action. And the counterclaims, which were then inverted to make Exxon/Mobil the plaintiff, the real plaintiff in

interest in the Delaware action, were not filed until January of 2002, just a couple months before the ruling.

THE COURT: Yes, but the state judge inverted it because the state judge found that in effect mediation in New Jersey was not going well, that you all ran down to Delaware quick to beat Exxon to the punch. So we have a state court finding on that. Correct?

MR. CASTANIAS: There is a state court—I don't know if you would characterize it as a finding or a comment. Even if it's a finding, I'm not sure where that takes us with respect to the questions raised by the court though. Because what's happened subsequent to that finding or that comment by the Delaware court is that the Delaware case has proceeded to judgment.

And what Exxon/Mobil now seeks by this second case, the case we've referred to as New Jersey 2, is a contingent second bite of the apple. We don't understand why this case is still around at this point now.

This case has gone forward to judgment in Delaware. It is now on appeal to the Delaware Supreme Court. We hope to win there.

If we win, I don't understand what Exxon/Mobil will be able to do in Federal District Court in New Jersey after that. One would think that res judicata would attach. One would think that any effort to overcome such a ruling by the Delaware Supreme Court on appeal would inevitably ask Judge Walls to reconsider state court rulings, which is clearly the *Rooker-Feldman* doctrine.

THE COURT: Well that assumes that the appellate ruling is definitive. I mean you could have, the Supreme Court could say there was trial error, we're sending it back for new trial. And then at that point they could say, well Exxon could say well, we would rather do this in New Jersey.

So I understand that if we were looking at a Supreme Court judgment, we might have a *Rooker-Feldman* or another issue, but at this point we don't really know how that's coming out.

MR. CASTANIAS: Well that's exactly right. And let me get to the bottom line of how we would answer the court's two questions with respect Colorado River abstention and *Rooker-Feldman.* Because there is, and as the record currently stands right now there would have to be a *Rooker-Feldman* problem, because we have a state court judgment which has led Exxon/Mobil to tell this court that it's willing to dismiss this case if they get what they want in Delaware.

But what we would suggest, if we lose on the Foreign Sovereign Immunities Act issues, and that's the only way these issues come up. We continue to maintain that we're immune and that the district court erred on its two alternative holdings, and I'll get to that in a moment.

But in the event of any remand or further proceedings on the New Jersey 2 matter, I would suggest that the court remand the matter with specific instructions to the district court to reconsider the Colorado River abstention question in light of the changed circumstances arising from the completion of the Delaware trial court proceedings and the Delaware judgment.

And the Colorado River abstention is not a dismissal, it's simply a stay, so that would hold things in abeyance until it could determine, Judge Chertoff, whether the concerns you're raising about what might happen in the Delaware Supreme Court in fact come to pass.

And—

THE COURT: Do have you a sense of when the Delaware Supreme Court might resolve the case? Is there—

MR. CASTANIAS: I can give you some background of it, Judge Fuentes. Our brief, our opening brief on the Delaware

Supreme Court appeal was originally due right around this time, maybe actually a couple weeks ago it would have been due.

There's a pending remand motion in the Delaware Supreme Court having to do with a statement of foreign law that's been submitted by the Saudi Arabian government in that case. That motion is pending before the Delaware Supreme Court. That could end up, in theory, if the remand is granted and the trial judge in Delaware considers the arguments that we'll make, that could end up turning the judgment around at the trial court level.

If not, we could end up with briefing in the Delaware Supreme Court over the next four to six months, I would guess, and an argument shortly thereafter.

If I can turn from the court's letter to the two—

THE COURT: Just one thing on *Rooker-Feldman*. You're saying on *Rooker-Feldman* there is or is not jurisdiction? From your position normally you would want to argue that there is not jurisdiction in light of *Rooker-Feldman*. But if so, how do you get there?

MR. CASTANIAS: Well, I think our position is that it's not clear yet whether there's jurisdiction or not. At this point Exxon/Mobil doesn't want to go forward in New Jersey. That matter is stayed. They've got a judgment, significant-sized judgment out of the Delaware trial court. And at this point *Rooker-Feldman* in their case would not present directly a *Rooker-Feldman* problem in its current posture because Exxon/Mobil isn't asking the district court in this case to do anything; the matter is stayed.

The *Rooker-Feldman* problem arises if—my dialogue with Judge Chertoff earlier—if in that circumstance we get a definitive ruling from the Delaware Supreme Court—

THE COURT: Does it have to be the Supreme Court?

MR. CASTANIAS: Or the trial court, for that matter. The trial court judgment. But what would have to happen the *Rooker-Feldman* problem—

THE COURT: I mean normally you think of *Rooker-Feldman* is you can't take a Supreme Court judgment and take it to, appeal it to an intermediate Federal Court under Section 157 of Title 28, you have to go directly to the U.S. Supreme Court and ask for cert.

MR. CASTANIAS: That's right.

THE COURT: But here we have a case, Desi's Pizza, which talks about were claims, quote, actually litigated, close quote, in the state court. And the question is when do claims become, quote, actually litigated.

MR. CASTANIAS: Well, I think—I confess to your Honor I'm not familiar with Desi's Pizza off the top of my head. But the language you're using comes very close to the language of res judicata. And at this point the current status of New Jersey 2 is that it's in abeyance.

Exxon/Mobil isn't asking that court to review anything at this point. If it asks that court to do anything that reviews a judgment of the Delaware court, then that would be, in our view, what triggers the *Rooker-Feldman* problem.

At this point, as we've suggested, we think the better course is if the New Jersey 2 case is still alive at the end of this appeal, if we lose on our Foreign Sovereign Immunities Act grounds, then the proper course is to remand and let the district court consider these matters in the first instance.

THE COURT: But don't you have to resolve this before you get to the FSIA argument?

MR. CASTANIAS: I'm not sure why one jurisdictional ground would have to be resolved before another.

THE COURT: Either you have jurisdiction or you don't. And then your second point is if you had your wish list we would remand to the district court, at the very least to conduct a Colorado River abstention analysis in light of the current facts.

MR. CASTANIAS: Well I think our wish list is that if you rule in our favor on the Foreign Sovereign Immunities Act grounds, if you find that the district court erred in his construction—

THE COURT: If we find that there was jurisdiction.

MR. CASTANIAS: Well the Foreign Sovereign Immunities Act is a jurisdictional provision as well. So if there's no jurisdiction under the Foreign Sovereign Immunities Act, I'm not sure which, whether *Rooker-Feldman* or the Foreign Sovereign Immunities Act jurisdiction should take precedence.

THE COURT: Well I guess we're talking about subject matter jurisdiction versus personal jurisdiction, are we not?

MR. CASTANIAS: Well, that is probably accurate.

THE COURT: No, isn't the FSIA also subject matter jurisdiction?

MR. CASTANIAS: It is indeed. Although it has aspects of personal jurisdiction to it as well because of the things like the direct effect test.

THE COURT: But would you agree with me though that at least as between Colorado River abstention and foreign sovereign immunity, Colorado River abstention is not jurisdictional. That's a prudential thing.

MR. CASTANIAS: That's correct.

THE COURT: And therefore the antecedent question would be a foreign sovereign immunities question.

MR. CASTANIAS: That's right. And if I could, Judge Chertoff, let me turn very briefly to the two points, and I see I've already used up all but a minute and—

THE COURT: That's okay. Eric, why don't you add five more minutes, please.

MR. CASTANIAS: Let me quickly turn to the two Foreign Sovereign Immunities Act questions on this case. The district court made two alternative holdings, one was that the Exxon/Mobil suit came within the commercial acts exception, and the other was that it was, that SABIC had waived its immunity by filing the New Jersey 1 and the Delaware suits. Neither of these holdings was correct.

With respect to the commercial acts exception, the district court ruled that there was a direct effect to the United States because Exxon and Mobil are United States companies—there's no other basis for the district court's ruling—that's an error as a matter of law.

That is not what Section 1605(a)(2) of the Foreign Sovereign Immunities Act and Title 28 says. It requires a direct effect in the United States, not a direct effect upon a United States corporation.

The cases we've established—yes.

THE COURT: Isn't the primary argument against you is you came to a state court and you filed in July of 2000 an action on the overcharge issue?

MR. CASTANIAS: That's correct.

THE COURT: Isn't that in and of itself a waiver of foreign sovereign immunity?

MR. CASTANIAS: And our answer to that is no. And the reason that the answer to that is no is because of the counterclaim provision. Section 1607 provides that when a

foreign sovereign files a lawsuit, the countersuing ability of the defendant is limited to counterclaims.

It is a specific textual provision that ought to govern over any general waiver provision, which is the point we've made in our briefs.

THE COURT: Doesn't the Second Circuit case from 20 years ago cut against you?

MR. CASTANIAS: Which case are you referring to?

THE COURT: The Ministry of Supply, Cairo, with Judge Friendly.

MR. CASTANIAS: I'm struggling here in recalling specific facts of Ministry of Supply.

THE COURT: Basically it's Egyptian cross-claims from, relating to a time charter in Egypt.

And Judge Friendly faces a specific issue, which is your argument that 1607 somehow by implication means the only way you can imply immunity from having litigated is by having a counterclaim. If you do it by way of cross-claim or some other mechanism it doesn't fall within 1607 and therefore that precludes 1605. And he basically rejects that argument.

MR. CASTANIAS: If that's the reading that this court gives to that decision, then we think that that is not textually proper. For all of the reasons we've set forth in our brief, the specific provision of the counterclaim provision governs over the general. I think in that case that also may be distinguishable because what you have there is a cross-claim within the same suit.

But what is crucial here is that the text of the Foreign Sovereign Immunities Act, which is to be narrowly construed, this court and other courts make that point clear, that text says that there are two specific provisions. One is when there is a

compulsory-type counterclaim, then you can bring a pure counterclaim in the same suit, and if it's not sufficiently related to be a compulsory-type counterclaim under the (b) provision, then you can bring an action for set-off under the (c) provision.

And if the contrary rule, the rule urged by Exxon/Mobil were correct, then the filing of a lawsuit by a foreign sovereign really does open up any court anywhere in the United States.

There's no limit to the theory that they've proposed and that the district court has adopted here.

THE COURT: Doesn't your action have to be—let me get a fact here. Your July 2000 action in Delaware, did it relate to the overcharge issue?

MR. CASTANIAS: Did it relate to the overcharge issue? It was a declaratory judgment that there was no breach because of the overcharge. Yes.

THE COURT: And so it would be almost automatic that the other side would file a counterclaim, would it not?

MR. CASTANIAS: Well it wasn't automatic because that counterclaim did not come until January 2002.

THE COURT: But ultimately it came.

MR. CASTANIAS: It did come.

THE COURT: And the New Jersey action that Exxon/Mobil filed was in effect a reiteration of, or a restatement of what ultimately became a counterclaim in Delaware, is that what you're saying?

MR. CASTANIAS: That's correct. Delaware gave them the opportunity, because the FSIA applies to that action as well. And we don't dispute the fact that they were perfectly entitled to file for counterclaims in that action. And they did file them. And they got the judgment and it's going up.

But what we do dispute is that gave them a right to file a free-wheeling lawsuit in New Jersey or Florida or Texas or Louisiana or anywhere else.

THE COURT: If this case is not—if you did not waive jurisdiction in this case by bringing a separate New Jersey action, or the Delaware action, when do you have waiver?

MR. CASTANIAS: Well waiver, Judge Fuentes, has been limited by the cases, and the cases turn to the legislative history of the Foreign Sovereign Immunities Act, to three circumstances—

THE COURT: No, don't do that. Because the legislative history doesn't say it's limited. It gives three illustrations.

MR. CASTANIAS: You're right. I misspoke, Judge Chertoff, it does give three illustrations. But the cases have fairly well limited waiver to those circumstances.

Now there are three cases that Exxon/Mobil relies on where they say that the initiation of other litigation brings you to waiver. And one of those cases is the 1979 case out of the district court in Illinois, in *Amoco Cadiz.* I see the red light is on but I'm hoping I can continue and hopefully—

THE COURT: Finish your answer to that. Yes.

MR. CASTANIAS:—get a little—

With respect to the *Amoco Cadiz* case, there was no reference to the text, no reference to the rule of narrow construction. And ultimately the district court there freely admitted that he was looking expansively at a big group of litigation.

The only other cases that Exxon/Mobil cites for the proposition that the filing of one lawsuit can be a waiver for another are two cases out of the Ninth Circuit. One of them the recent case of *Blaxland* and the other the *Siderman*

case. And *Blaxland is* really only cited for its discussion of *Siderman.*

But both the facts of *Siderman* and how it's been treated by other courts of appeals are very instructive about the scope of the waiver argument that Exxon/Mobil is making here.

In *Siderman* there was held to be a waiver by the fact that Argentina had filed a letter rogatory to seek to, as part of the extradition proceeding for Mr. Siderman. And Mr. Siderman was then extradited, taken to Argentina.

The act of the letter rogatory in that case was part and parcel, to use the Ninth Circuit's language, part and parcel of the claim itself of torture that was being litigated, and a waiver was found there.

Now I think what's important to note about *Siderman,* not only is that it's limited to the case where it's part and parcel, but also that it's of some questionable heritage.

The *Cabiri* case out of the Second Circuit suggests in fairly strong language that the *Siderman* case was a new and dubious theory. That's a quote from the Second Circuit there, the new and dubious theory that relies on, quote, largely inapt citation.

THE COURT: You're explaining, basically, why waiver is improper in several cases.

When do you have waiver?

MR. CASTANIAS: You have waiver, my answer to Judge Chertoff earlier was that the legislative history gave three illustrative examples.

Waiver can happen when there's an agreement to arbitrate in another country. In other words there's a contract between us and we agree that we will arbitrate this matter in a particular country. And if we agree to arbitrate in the United States, for example, that could be a waiver.

And it's important to note here, Judge Fuentes, that the agreements that are said to be breached here, those agreements provide for absolutely everything to take place in Saudi Arabia.

THE COURT: But isn't the real one when the foreign state is filed under statute, a responsive pleading in an action without raising the defense of sovereign immunity? Now I don't necessarily say that filing a complaint in Delaware is a responsive pleading, but it's the exact equivalent that you're taking advantage of a Delaware court to try to get a declaratory judgment with regard to your particular dispute.

MR. CASTANIAS: That's exactly right, Judge Ambro, and that's why Exxon/Mobil was allowed to file counterclaims in that matter.

The rule for an ordinary litigation established by the Supreme Court in the early part of the 20th Century is that the plaintiff is the master of his complaint, and that means that the plaintiff can pick where to bring this lawsuit.

In this case SABIC brought this lawsuit in Delaware not for forum shopping, although I'm not here to try to contest that finding or that comment by the trial court in Delaware, but it brought it because that was a place where there could be no question about jurisdiction over all of the defendants in the matter.

That it made sense in that regard. Now I realize the red light is on—

THE COURT: What we're going to do is hear from your opponent, and then we'll go, at 2201, we'll give you a fresh set of time, both sides for that.

MR. CASTANIAS: Thank you, your Honor.

MR. QUINN: May it please the court, James Quinn for Exxon/Mobil and the other Exxon defendants-appellees.

THE COURT: Again, if you would start off addressing the jurisdictional issues. Maybe start off with *Rooker-Feldman* and then if you want to go to the FSIA, then we can end up with Colorado River abstention.

MR. QUINN: Sure. I will concede to you this is the first time I've ever dealt with the *Rooker-Feldman* doctrine.

THE COURT: It sounds simple, but it ain't.

MR. QUINN: That I can see. I think in this particular instance we and SABIC probably are in agreement, that at least as of now the *Rooker-Feldman* doctrine would not apply. And I think the reason for that is really two-fold. We agree on one of the issues, and probably on the other, I'm not sure.

But the reason why *Rooker-Feldman* would not apply is that in the circumstances we are in right now, the district court is really not being asked to do anything with regard to the Delaware judgment. In fact, as your Honor knows, we have said—

THE COURT: But have the claims been, quote, actually litigated, close quote, in Delaware? I mean the thing that you've got going for you on *Rooker-Feldman* is that this circuit probably construes *Rooker-Feldman* more narrowly than any other circuit in the country, but it doesn't appear to be helpful to having the same claims being litigated in two courts. There's a lot of policy against that.

MR. QUINN: The reason why I think it's probably premature to adopt the doctrine at this stage is a lot of what happens depends on what the Delaware Supreme Court does. But—

THE COURT: But the question is, the issue with respect to the doctrine relates to federal jurisdiction. I mean we have to address it at the outset.

MR. QUINN: But as I understand the doctrine, the doctrine comes into play when a district court, a Federal District Court is being asked to in effect challenge or undercut in some way something that a state court, a state court judgment that's been entered. That's not what is happening here.

THE COURT: Are there issues that are so substantially intertwined in the state court judgment in Delaware with the federal action in New Jersey?

MR. QUINN: With regard to—

THE COURT: Are the overcharge issues essentially the same?

MR. QUINN: They are, your Honor. But our point has always been, and the reason why, what we call New Jersey 2, the overcharge case, continues to be extant is, first of all there's different parties, which also in the case that I think came down this summer in the Third Circuit, the case involving Amtrak, I can get you the cite.

THE COURT: I was on the panel.

MR. QUINN: Okay. One of the reasons you didn't apply *Rooker-Feldman* was because the parties weren't the same. That happens to be the case here. Exxon/Mobil is a plaintiff in the New Jersey overcharge case, the parent. It is not involved at all and has never been involved in the case in Delaware.

THE COURT: So are you telling us that basically even if the Delaware Supreme Court affirms your win below, there would be a subsequent litigation in New Jersey?

MR. QUINN: No, I'm not telling you that, your Honor, because in fact if there was a complete affirmance, we can only collect the $417 million once.

THE COURT: So if that were to happen then basically there really would be nothing left to do except dismiss the New Jersey case?

MR. QUINN: That's correct. And that's why when we initially argued this summer that this appeal be stayed, we still believe, frankly, I hate to reargue that, but we still believe that that probably is the proper thing to do at this stage, because in fact if the Delaware Supreme Court affirms the jury verdict, nothing, there's nothing further that needs to be done. The overcharge issue may get litigated in the context of New Jersey 1 as an affirmative defense and unclean hands.

THE COURT: So I'm sort of lost. Why do you care what happens in New Jersey?

MR. QUINN: Good question. The reason is because if, and we think it's unlikely, but if the Delaware Supreme Court were to reverse on some ground other than on pure substance, that would be res judicata, the fact is and one of the issues that's in the Delaware Supreme Court is the statute of limitations issue.

Well the statute of limitations in Delaware and in New Jersey are different. And it's more favorable to Exxon/Mobil, the statute of limitations, to be in New Jersey, which is one of the reasons why we wanted to be in New Jersey and they ran down to Delaware. And so—

THE COURT: But I guess you're not too unhappy so far in Delaware.

MR. QUINN: So far so good. So far so good, but knock on wood, you never know, because anything could happen. We feel pretty good about it but—

THE COURT: So New Jersey's an insurance policy.

MR. QUINN: In a way it is. But it's only an insurance policy, your Honor, because they were the ones who ran down to Delaware. We were perfectly happy to litigate

all the issues in New Jersey. They chose to go down to Delaware, and that of course leads into the whole issue of waiver. But I can also address briefly the abstention issue, if you like.

THE COURT: Maybe—

MR. QUINN: Oh you want me to go—

THE COURT: Why don't you go to FSIA then hit abstention at the end.

MR. QUINN: The two issues, and I think they're pretty clear, are the waiver issue and whether or not there was a direct effect under 16—under the commercial enterprise issue.

On the waiver issue, our position, we believe the district court was correct finding waiver.

If bringing two lawsuits, one in New Jersey and one in Delaware, isn't waiver, I don't know what could possibly be waiver.

THE COURT: What about the personal jurisdiction argument that SABIC raises, which is that it may be waiver insofar as there's a component of foreign sovereign immunity that applies to the immunity, but not as it relates to the personal jurisdiction issue.

MR. QUINN: And that may very well be valid. But in fact in New Jersey, for example, we did have personal jurisdiction, it was found to have personal jurisdiction. They have a, SABIC has an operation in New Jersey.

In fact, what we're saying is—let me give you an extreme example. Okay, let's suppose they sue in state court in California, and I'm making the example that I figure that really you're going to. Where could we sue? What's the waiver mean?

Well, it seems to us, and I believe this is a fair reading of the statute, if you can find—that's a waiver of the subject matter jurisdiction. So okay, now you can sue them. Question is where. Well, if they had a facility in Texas, or as they did here in New Jersey, or in North Carolina, you could go in and sue them in those other states. And that's I think a fair reading of the statute. And there's nothing in the statute that would prevent that.

I mean two points on the statute I think that are important and I don't want to go on to legislative history, but the fact is that the statute itself and the cases that have been decided under it make it clear that it's up to SABIC, the foreign sovereign, first of all, to show that in fact it's immune, the burden is on them.

And the burden also, once we've come forward to argue waiver and/or commercial exception, the burden is on them to show that the exceptions don't apply. And the reason for that is, and I think the Texas Trading Case in the Second Circuit is critical here, they said look, this is a matter of fairness to some degree.

This is not a situation, your Honors, where, what the Foreign Sovereign Immunity Act was really all about, preventing somebody from dragging a foreign sovereign into the United States courts.

They came here willingly twice on these very same issues. And what the Texas Trading Case says, and the reason for the exceptions is, we've got to have—it's a question of fairness. You've got to make sure that if somebody has, in this case Exxon/Mobil, has in fact been negatively affected by a foreign sovereign there has to be a place they can sue them.

So it only seems a question of fairness that the, based on what they did that in fact they have waived with regard—

THE COURT: Let me talk about commercial acts for a second. I want to make sure I understand. The essence of your claim is that SABIC overcharges the intermediary joint ventures, correct?

MR. QUINN: That is correct.

THE COURT: And the economic effect on—now the plaintiffs in New Jersey are the ultimate owners or the intermediate joint ventures?

MR. QUINN: They are the ultimate owners. They were also the plaintiffs in Delaware.

THE COURT: All right. So the economic, the way the economics of this works is, because of the overcharge to the intermediary, your claim is that the intermediary will therefore distribute lower dividends to the ultimate owners.

MR. QUINN: In essence. I mean if you look at the case that I think is governing here, the Supreme Court case in *Weltover* basically what the case says is, and it expanded this issue, and it basically says if there is a direct impact, direct effect, what does that mean?

What it means, to use the language of the Supreme Court is that, assuming it's not purely trivial, and I assume we can agree the 417 million isn't purely trivial, that it means there is an immediate consequence as a result of the defendant's activity.

Well, the jury has found in Delaware, with regard to these plaintiffs, on a dollar-for-dollar basis, there was an immediate consequence.

THE COURT: Well, I don't think you can—

THE COURT: Wait a minute. What is the immediate consequence? You're saying the 417 million, is that the dividend payment?

MR. QUINN: The $417 million was the amount of the overcharge and additional losses that were incurred.

THE COURT: I thought it was argued that there was a reduced dividend payment to ECAI, is that correct, and Mobil Yanbu.

MR. QUINN: Well, what it means is that the two joint ventures, as a result of the overcharge, obviously became that much less profitable in its ability to pay out money to—

THE COURT: But other than the possible reduced dividend payment, what conceivable direct loss was there in the U.S. that resulted from the overcharge?

MR. QUINN: I think the key thing you have to remember, your Honor, is that in this circumstance, the contracts that existed that actually created this obligation with regard to the overcharge, were not between SABIC and the joint venture.

The contracts ran directly from SABIC to the two Exxon/Mobil companies that were injured. And that's why we had a breach of contract claim in Delaware because it was—

THE COURT: But I think your problem here is this. It seems to me you're arguing that the overcharge caused a loss of profit in the joint venture, and then the next step is that leaves less money in the joint venture to be distributed as a dividend. But that's an intervening decision.

A lot of times, for whatever reasons, a dividend isn't distributed. Supposing the joint venture went into bankruptcy or were independently sued by some third party somewhere and that suit resulted in freezing all of the assets of the joint venture and there wasn't going to be a dividend distribution.

So it seems to me because you have a second step, which is you've got to show the dividends were—not just that there was a diminution of the joint venture's profits, but that there was an impact in the dividends. You've got the essence of an

indirect effect because there's a second step that has to happen.

MR. QUINN: With due respect, your Honor, I disagree. The direct effect is they make a promise to us. We are in the United States. It's a written contract. They breached that promise. The only place that we can suffer that breach is in the United States. That's separate and apart from the financial loss. And indeed there are two circuits, the Fifth and the Sixth Circuit—

THE COURT: What damage is there apart from the financial loss and breach of fact? It's always a loss of money.

MR. QUINN: But I'm focusing on what the direct effect was. The direct was the breach.

THE COURT: But the effect is what?

MR. QUINN: And it caused damage.

THE COURT: Well no, the breach is the wrongdoing, the alleged wrongdoing, the effect is the loss. If the loss is not in the United States there's no direct effect in the United States.

MR. QUINN: But we have a jury verdict that shows that the loss was in fact in the United States because that's—the jury found that the two U.S. subsidiaries suffered this dollar-for-dollar loss in the United States.

THE COURT: Do we have to wait to see if that gets affirmed? I mean if you're basing it on the jury verdict, you're saying we ought to wait on the foreign sovereign immunity point to see if the jury decides there is a direct effect. This is a legal question, it's not a jury question.

MR. QUINN: I actually think you should wait for other reasons.

THE COURT: I understand that.

MR. QUINN: But I take your point, your Honor.

THE COURT: Let's turn to the abstention issues. You heard me tick off eight abstention factors under Colorado River. And it appears that six of them cut against you and the other two don't really cut against your opponent.

MR. QUINN: Well the court, it's true that some factors have changed now because several years have gone by now. The court did look at this issue once and determined that—

THE COURT: Your opponent has said that perhaps what should be done is that if we have jurisdiction, to remand to the district court to declare under these circumstances whether abstention should be availed of in this case.

MR. QUINN: I think one point I would make, and this actually goes to the letter that you had written us, the lower court has already stayed the case because of the other issues in Delaware.

THE COURT: All the more reason should we not remand to the district court to—if there's a stay in place, it's for what reason?

MR. QUINN: The stay is currently in place because the district court has indicated, depending on the outcome of the jury verdict, that it may dismiss the first New Jersey case on unclean hands basis.

THE COURT: You mean the patent case?

MR. QUINN: Yes, the patent, it's a contract patent case, yes.

THE COURT: I'm not talking about the patent case, because we'll talk about that in a moment, but what about the overcharge case that was subsequently filed by you in New Jersey after SABIC filed in Delaware?

MR. QUINN: That is also, the whole, the cases have been consolidated, your Honor.

THE COURT: Okay.

MR. QUINN: So the whole ball of wax has been stayed, pending the outcome of the Delaware appeal.

THE COURT: So in effect, there's an argument as to why are we here?

MR. QUINN: Yes, your Honor, I think there is a strong argument as to why we're here. At this stage. We've said that before.

THE COURT: Do you care to tell me?

MR. QUINN: Well, we're here because they brought us here. As far as we're concerned, we're perfectly happy sitting and waiting to see what happens in the Delaware Supreme Court. That's been our position all along. We don't think that the FSIA needs to be decided now.

THE COURT: Let me ask you a dumb question. Is there a possibility that you could stipulate that the—I guess there's a stay—I really am—I don't understand why we're even pursuing these issues now.

MR. QUINN: It is a fair question, your Honor. The reason why is that the stay was put into effect after this appeal began on the FSIA issue.

THE COURT: And I guess in some way you did file, I guess before us, a motion to stay the appeal.

MR. QUINN: Yes. And you had stayed it for a while.

THE COURT: What circumstance would occur in Delaware that would cause the New Jersey action to go forward?

MR. QUINN: Well, I think, again, if the, if there was a reversal based on statute of limitations grounds, I think that would probably be the principal one, your Honor. Because as I said the statute of limitations is more favorable to us in New Jersey and we would then want to pursue the case there.

THE COURT: Now you say the stay is in effect right now with regard to both the overcharge and the patent actions; is that correct?

MR. QUINN: That's correct, your Honor.

THE COURT: The motion that was filed in this court that at one point was granted to stay the appeal, was that with regard to both the patent action and the overcharge action?

MR. QUINN: It was actually directed only at the overcharge action, the FSIA appeal.

THE COURT: Would you have any objection if it also were to apply to the patent action?

MR. QUINN: No.

THE COURT: Anything else?

Did you want to have any rebuttal on this particular case before we begin 2201?

MR. CASTANIAS: Just briefly, your Honor.

THE COURT: Let me ask you, just as you come up, would you have any objection to the motion for stay pending appeal, or motion I guess for stay of the appeal, excuse me, also applying to the patent action?

MR. CASTANIAS: I got a little confused at the end of the argument that we just heard, because my understanding of where things stand right now is that the stay of the appeal that Exxon/Mobil sought on the Foreign Sovereign Immunities Act appeal was lifted and that's why we're arguing this here.

THE COURT: No, you're right. You're right. I'm just saying it may be worthwhile going back and revisiting that.

MR. CASTANIAS: Well, I would urge you not to do that. I would urge you to throw the suit out on the Foreign Sovereign Immunities Act grounds that we've urged.

With respect to the other appeal, which I'll get to in a moment, let me—

THE COURT: But if we don't, let's say—

MR. CASTANIAS: If you don't do that then I think we have a problem, because what's happened subsequent—

THE COURT: Okay. But if we do not rule in your favor on the FSIA, then what is your position?

MR. CASTANIAS: Our position is that the court should remand the matter to the trial court for reconsideration of the Colorado River abstention factors in light of the *Rooker-Feldman* issues that have been raised by the Court. And—

THE COURT: Instead of holding the appeal—instead of staying the appeal pending what happens in Delaware.

MR. CASTANIAS: Well, I guess we get to the same place if you stay the appeal. Understand, however, that—

THE COURT: Well the only problem is that the patent case isn't being litigated in Delaware, that's the reason I'm—

MR. CASTANIAS: That's right. Oh, if the question, Judge Ambro, was directed to what you should do with the number 03-2201, that's what I was trying to get to, what's happened since this appeal in that case, is that SABIC has been put to a contempt hearing, and that matter has been stayed pending the outcome of that appeal by the district court.

Now I believe there is also, it may be also to say it in light of getting the decision out of Delaware, but Delaware really only affects the New Jersey 2 case, instead of what you've called the patent case, and it would be worth talking about in a moment.

Let me, by the way, before I lose my last minute here, try to address three points with respect to the Foreign Sovereign Immunities Act appeal—

There is a lurking *Rooker-Feldman* problem, as the Court has noted. There is an admission now by Exxon/Mobil that they're just using the suit as an insurance policy. That's exactly the sort of thing the federal courts ought not be used for.

This case may—perhaps it should be kicked on *Rooker-Feldman* jurisdictional grounds. But I think the better course is what we proposed earlier, which is a specific remand with specific directions to consider.

Turning to the commercial activities exception, Exxon/Mobil cited the case of Texas Trading. And both they and the district court read Texas Trading as standing for the proposition of as long as you've got an American plaintiff who can claim injury, that's enough to suffice for a direct effect in the United States. That's not correct.

It's not even correct as a matter of Second Circuit law. The Texas Trading court specifically reserved that issue. If I can hopefully address this quickly and address one other point.

THE COURT: You can finish that.

MR. CASTANIAS: The Texas Trading court specifically reserved that issue, Judge Chertoff, and subsequent Second Circuit decisions in Martin against South Africa and in the Virtual Countries case, both of which are cited in our briefs, made clear that it is not read for that expansive a proposition. Otherwise it would read out the direct effect in the United States portion of the FSIA and would simply make it a direct effect on an American plaintiff. That's not what the text says.

The polyethylene plant that was the subject of the joint venture agreements was in Saudi Arabia, all the payments were made in Saudi Arabia. There was no direct effect. At most there was an attenuated effect.

And the fact that the damages were awarded in Delaware proves nothing. All that proves is that there was causation under the common law causation doctrines. But the jury did not find in that case, and was not asked to find, that there was a direct effect in the United States.

Turning finally to the question of waiver, and again Judge Chertoff, your question that I was not prepared for with regard to Ministry of Supply, my recollection of the case was accurate, that was a case involving a cross-claim where the counterclaim provisions simply couldn't be invoked. It was also a case where the waiver in the case happened within the same—

THE COURT: But in that case Judge Friendly addresses your argument. He says look, basically I don't read 1607 as having been intended to narrow what might otherwise be under 1605. I mean that seems to me to be pretty—I mean we don't have to agree; we're not in the Second Circuit. But if we were in the Second Circuit, that would be pretty much fatal to your position, wouldn't it?

MR. CASTANIAS: Oh, I guess I don't agree with that, because I think if you look at the *Cabiri* case, which I pointed out in my opening remarks, the *Cabiri* case makes clear that with regard to the, where a counterclaim would be available, waiver is not available. That's very clearly what Judge Jacobs held for the panel there.

The question of a counterclaim being available was not at issue in the Ministry of Supply case written by Judge Friendly. And I clerked in the Second Circuit and I have the greatest respect for Judge Friendly, but this case is not on point with ours. This is a case where they have a counterclaim, they litigated the counterclaim, it was available.

It was available to them. There was no need, no basis for invoking the waiver provision in this case.

THE COURT: Before we go on to the next case, I would ask that counsel submit to the court by Friday, December 19, an analysis of the *Rooker-Feldman* and abstention issues. I think that we would find that helpful.

In addition, subsequent to this oral argument, if you would have both this and the argument to follow in 2201 to be transcribed and have a transcript prepared for the court.

MR. CASTANIAS: We will, your Honor.

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December 18, 2003

BY FEDERAL EXPRESS

Marcia M. Waldron,
Clerk United States Court of Appeals
for the Third Circuit
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Re: Saudi Basic Industries Corp. v. Exxon Mobil Corp., Case No. 02-2130

Dear Ms. Waldron:

I. INTRODUCTION.

As directed by the Court at oral argument on December 9 (*see* Tr. at 46:10-13, 81:11-14), Appellees Exxon Mobil Corporation, Exxon Chemical Arabia, Inc., and Mobil Petrochemical Company, Inc. (collectively, "ExxonMobil") submit this letter to address the Court's questions relating to the *Rooker-Feldman* doctrine and *Colorado River* abstention. As explained below, ExxonMobil agrees with Appellant Saudi Basic Industries Corporation ("SABIC") that the *Rooker-Feldman* doctrine has no current application to this case. (*See id.* at 11:19-23.) As for *Colorado River* abstention, the District Court's refusal in April 2002 of SABIC's request for abstention, is a non-final ruling that need not be revisited at this time because the District Court has, in fact, stayed the litigation below.

Instead, ExxonMobil continues to believe that the Court should stay resolution of this appeal pending disposition of related proceedings in the Delaware Supreme Court, which may well render moot not only those issues and the foreign sovereign immunity question now before the Court, but indeed the entirety of the underlying litigation.

II. BACKGROUND.

A. The Underlying New Jersey Actions.

The litigation history between the parties began on October 26, 1998, when SABIC filed Civil Action No. 98-4987 in the United States District Court for the District of New Jersey ("NJ-I"). On August 8, 2000, ExxonMobil filed Civil Action No. 00-3841 against SABIC in the same District Court ("NJ-II").

Though NJ-I and NJ-II have been consolidated for all purposes, this appeal arises from the District Court's denial of SABIC's motion to dismiss ExxonMobil's claims in NJ-II under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq*. ExxonMobil's Complaint in NJ-II alleged that SABIC had breached certain Joint Venture Agreements between SABIC and ExxonMobil by overcharging their two joint ventures, Saudi-Yanbu Petrochemical Company ("YANPET") and Al Jubail Petrochemical Company ("KEMYA"), licensing fees for use of certain technology to manufacture polyethylene.

B. The Related Delaware Case.

SABIC filed suit in the Superior Court for the State of Delaware in and for New Castle County, Civil Action No. OOC-07-161 ("Delaware Case") on July 24, 2000, seeking a declaration that it had not overcharged YANPET or KEMYA in breach of the Joint Venture Agreements. The ExxonMobil defendants in Delaware raised several counterclaims seeking to recover the overcharged amount; as in NJ-II, the Delaware

counterclaims alleged that SABIC had breached the Joint Venture Agreements by overcharging YANPET and KEMYA for their use of technology to manufacture polyethylene. SABIC itself filed the Delaware Case and, accordingly, its alleged sovereign immunity under the FSIA is simply not at issue there.

On March 21, 2003, the jury in the Delaware Case found that SABIC had wrongfully overcharged both YANPET and KEMYA, in breach of its express contractual obligations owed directly to the ExxonMobil defendants in the United States under the Joint Venture Agreements, and awarded damages in the amount of $416,880,764. SABIC has appealed that judgment to the Delaware Supreme Court (Case No. 493, 2003).

C. The Relevant Proceedings Below.

SABIC moved to dismiss ExxonMobil's Complaint in NJ-II, raising FSIA immunity and also urging the District Court to abstain, in favor of the Delaware Case, under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). ExxonMobil, in turn, moved to consolidate NJ-I and NJ-II, in part because the overcharge issue was common to both actions. On April 3, 2002, the New Jersey District Court denied SABIC's motion to dismiss or abstain and granted ExxonMobil's motion to consolidate. The denial of SABIC's motion to dismiss on FSIA grounds is the subject of this appeal.

There are ***two stays*** currently in effect in the District Court. On June 5, 2002, the District Court granted SABIC's motion to stay all proceedings in NJ-II pending the outcome of this appeal. (6/5/02 Order at 2 (Tab A).) On June 26, 2003, the District Court stayed proceedings in the consolidated cases pending the outcome of the appeal in the Delaware Case (6/26/03 Order (Tab B)), which ExxonMobil has asserted is

dispositive of SABIC's NJ-I claims under the equitable doctrine of unclean hands.

D. Prior Proceedings in this Court.

Because the proceedings in the Delaware Case may ultimately prove dispositive of this appeal, on July 9, 2003, ExxonMobil filed a motion to stay proceedings in this Court. As ExxonMobil then explained, if the Delaware verdict is affirmed, ExxonMobil will dismiss NJ-II, and the FSIA issues will become entirely moot. Only if SABIC is successful on appeal in Delaware, and only if the nature of any reversal or remand leaves open the possibility of a trial in NJ-II, would it then become necessary to address SABIC's FSIA arguments.

On August 5, 2003, a motions panel of this Court granted ExxonMobil's motion to stay. (8/5/03 Order (Tab C).) SABIC moved on October 24, 2003 to lift the stay, arguing that this case (No. 02-2130) should be argued together with SABIC's unrelated interlocutory appeal in NJ-I (No. 03-2201); ExxonMobil maintained that the stay was appropriate and that lifting the stay would unnecessarily tax the Court's resources over a matter that could well become moot. On November 12, 2003, the Court granted SABIC's motion to lift the stay in this case (11/12/03 Order (Tab D)), and the two appeals were argued together on December 9, 2003.

E. Questions Posed by the Court and ExxonMobil's Answers.

On December 8, 2003, the Court advised the parties of two issues it wished to have addressed at the oral argument:

1. Whether the District Court has jurisdiction over this case notwithstanding the Rooker-Feldman Doctrine, which precludes a federal court from hearing claims that have been already litigated in state court?

2. Whether the District Court should apply the Colorado River Abstention Doctrine to this case, and

either stay or dismiss the case pending the outcome of SABIC's appeal of the Delaware Superior Court judgment in Exxon's favor?

(12/8/03 Letter (Tab E).)

For the reasons explained below, ExxonMobil answers the Court's questions as follows:

1. Yes, the District Court has jurisdiction over this case notwithstanding the *Rooker-Feldman* doctrine. Furthermore, in order to avoid a *Rooker-Feldman* problem from arising in the future, the District Court has appropriately stayed all proceedings in NJ-II pending the outcome of this appeal and of the appeal in the Delaware Case.

2. No, the District Court need not apply the *Colorado River* abstention doctrine to this case, because the District Court has already stayed the case on other grounds. This Court, likewise, should stay this appeal in order to avoid rendering an unnecessary advisory opinion on the FSIA issues SABIC has raised.

III. EXPLANATION OF EXXONMOBIL'S ANSWERS.

A. The *Rooker-Feldman* Doctrine Has No Application to this Case.

The District Court has jurisdiction over ExxonMobil's claims in NJ-II, notwithstanding the judgment in Delaware, because ExxonMobil has not asked the District Court to take any action that would undermine, or be inconsistent with, the judgment in the Delaware Case. As SABIC acknowledges, "at this point" NJ-II "would not present directly a Rooker-Feldman problem . . . because ExxonMobil isn't asking the district court in this case to do anything; the matter is stayed." (Tr. at 11:18-23.) ExxonMobil agrees.

This Court has explained the *Rooker-Feldman* doctrine[1] as follows:

> [A] claim is barred by *Rooker-Feldman* under two circumstances: first, if the claim was "actually litigated" in state court prior to the filing of the federal action or, second, if the claim is "inextricably intertwined with [the] state adjudication," meaning that "federal relief can only be predicated upon a conviction that the state court was wrong."

Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003) (citations omitted). Neither circumstance is present here.

First, the "actually litigated" circumstance does not trigger *Rooker-Feldman* in this case, because the judgment in the Delaware Case did not issue "prior to the filing of the federal action." *See id.* ExxonMobil filed NJ-II on August 8, 2000, but the Delaware Case did not reach final judgment until more than two-and-a-half years later, on March 21, 2003.

Second, the "inextricably intertwined" circumstance also has no application. *Desi's Pizza* explains the two sub-circumstances that can give rise to this aspect of *Rooker-Feldman*:

> A plaintiff's claim for relief in a federal action is "inextricably intertwined" with an issue adjudicated by a state court under two circumstances: (1) "when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously

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[1] The *Rooker-Feldman* doctrine, derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "is based on 'the well-settled understanding that the Supreme Court of the United States, and not the lower federal courts, has jurisdiction to review a state court decision.'" *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 419 (3d Cir. 2003) (quoting *Parkview Assocs. P'ship. v. City of Leb.*, 225 F.3d 321, 324 (3d Cir. 2000)).

entered" and (2) when "the federal court must . . . take action that would render [the state court] judgment ineffectual."

Id. at 421 (citations omitted). In this case, ExxonMobil has not asked the District Court to determine that the judgment in the Delaware Case was "erroneously entered"—indeed, as the victor in Delaware, ExxonMobil would never seek such relief. Likewise, ExxonMobil has every incentive and intention of defending and enforcing the judgment in the Delaware Case and no intention of rendering it "ineffectual."

Both parties are thus in agreement that in the present circumstances there is no basis for a jurisdictional dismissal of NJ-II based upon *Rooker-Feldman*. At most, there are speculative future scenarios under which ExxonMobil would be potentially precluded from pursuing NJ-II if the Delaware Supreme Court vacates the trial court's judgment.[2] (*See* Tr. at 13:3-7 (SABIC's argument that *Rooker-Feldman* may apply "***[i]f***" ExxonMobil in the future asks the District Court to "review[] a judgment of the Delaware court") (emphasis added).) Such speculation is an insufficient basis to conclude now that the District Court lacks jurisdiction, especially when ExxonMobil has represented that it will not pursue relief in NJ-II that is barred by issue or claim preclusion based on the final result in Delaware.[3] As SABIC has suggested, "the

[2] For example, if the Delaware Supreme Court reversed the judgment based on a finding that SABIC never overcharged YANPET or KEMYA, ExxonMobil could not (and would not) ask the District Court in NJ-II to review that finding. On the other hand, as the Court observed during oral argument (*see* Tr. at 8:17-18), if the verdict in the Delaware Case is reversed on procedural grounds, then ExxonMobil's pursuit of NJ-II would not necessarily pose any *Rooker-Feldman* conflict.

[3] Furthermore, even if the circumstances of *Rooker-Feldman* were otherwise present, the fact that Exxon Mobil Corporation is a plaintiff in NJ-II, but was not named in the Delaware Case, renders the doctrine inapplicable at least as to that party. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Utility Comm'n*, 342 F.3d 242, 256 (3d Cir. 2003) (declining to apply *Rooker-Feldman* doctrine where plaintiff in federal action "was not even a party in the Commonwealth Court proceeding").

district court" should "consider these matters in the first instance" when and if there is a reason for it to do so. (*See id.* at 13:11-13.) There is no reason for it to do so now.

B. The Court Should Renew the Stay of this Appeal Rather Than Review the District Court's Denial of *Colorado River* Abstention.

In light of the stays the District Court has already ordered, no further action is required in that court to maintain the *status quo*, and there is therefore no reason to revisit the District Court's interlocutory denial of *Colorado River* abstention. The same considerations that prompted this Court to raise the abstention question do, however, warrant a renewed stay of this appeal.

As a threshold matter, the District Court conducted a thorough analysis of the *Colorado River* abstention arguments that SABIC initially raised and concluded that abstention was not appropriate. *See Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 412-14 (D.N.J. 2002). Of the six factors to be considered under *Colorado River* and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 25-26 (1983), three favored ExxonMobil, one favored SABIC, and the other two were neutral. *See generally Saudi Basic*, 194 F. Supp. 2d at 412-14.[4] Pivotal in the District

[4] The six factors considered by the District Court, as set forth in *Colorado River* and *Moses H. Cone*, were: (1) whether one court first obtained *in rem* (or *quasi in rem*) jurisdiction over property involved in the litigation; (2) inconvenience of the federal forum; (3) desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction is obtained by the concurrent forums; (5) whether federal or state law applies; and (6) the adequacy of the state court proceeding. *See* 194 F. Supp. 2d at 412. As to each of these factors, the District Court found, respectively, that: (1) neither court had *in rem* or *quasi in rem* jurisdiction over property, so the first consideration was "inapplicable"; (2) the federal

Court's analysis was that SABIC had filed NJ-I in New Jersey ***two years before SABIC filed the Delaware Case***, and "the overcharge issue was already being litigated" as a defense "in the NJ I action when SABIC filed the Delaware action." *Id.* at 414 & n.15. Recognizing the Supreme Court directive that the "'balance'" is "'heavily weighted'" against abstention, *see id.* at 412 (quoting *Moses H. Cone*, 460 U.S. at 16), the District Court found that the fact-specific inquiry did not support abstention in this case.

Nevertheless, after SABIC appealed the District Court's simultaneous ruling that SABIC was not entitled to foreign sovereign immunity, the District Court stayed NJ-II pending the appeal to this Court. (*See* 6/5/02 Order at 2 (Tab A).) After the Delaware verdict, the District Court entered a second stay pending SABIC's appeal to the Delaware Supreme Court. (*See* 6/26/03 Order (Tab B).) Thus, even in the absence of a finding that *Colorado River* abstention was warranted, the District Court has already held that it will not entertain ExxonMobil's claims in NJ-II at least until after the various pending appeals are resolved. There is no need for any further action in the District Court in order to "hold things in abeyance," which is precisely what SABIC says it wants. (*See* Tr. at 10:1-3.)

This Court therefore need not review the District Court's rejection of *Colorado River* abstention or remand the case for

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forum in New Jersey was "not inconvenient," a factor that "weighs in favor of this Court not abstaining"; (3) because of the earlier-filed "closely related matter" in NJ-I, "greater judicial economy is served by adjudicating these cases in this forum rather than in Delaware"; (4) "the NJ-I action, in which the overcharge issue was already being litigated, was filed before the Delaware action," a finding that weighs against abstention; (5) the applicability of Saudi Arabian law was a "neutral" factor; and (6) "the state proceedings are adequate." *See id.* at 413-14. Nothing has changed since the District Court's April 2002 decision that alters the analysis under any of these factors.

the District Court to conduct any further analysis.[5] Instead, this Court should extend the stay so that it encompasses not only the proceedings in the District Court, but also this appeal, in order to avoid expending judicial resources that may be entirely unnecessary if the Delaware judgment is affirmed. *See, e.g., Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

At oral argument, the Court aptly asked the question, "why are we here?" (*See* Tr. at 38:15.) The answer to that question is that SABIC brought us here, not only by filing this appeal, but by insisting that the appeal move forward even though it may well become moot. If the Court wishes to avoid unnecessary proceedings, then as SABIC acknowledges "we get to the same place if you stay the appeal." (*See id.* at 42:5-6.) SABIC wishes to press for continued litigation only on that portion of NJ-II that it wants to pursue (this appeal), while joining in the call for a stay of the underlying case. The Court should reject that contradictory approach in favor of a stay that is consistent with the District Court's stay pending the outcome of the Delaware Case.

IV. CONCLUSION.

For the reasons set forth above, ExxonMobil respectfully suggests that there is no need for further evaluation of the *Rooker-Feldman* doctrine and no need or basis for the Court

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[5] Indeed, while an order ***granting*** *Colorado River* abstention is immediately appealable if it "has the practical effect of a dismissal," *see, e.g., Michelson v. Citicorp Nat'l Servs., Inc.*, 138 F.3d 508, 513 (3d Cir. 1998), an order ***denying*** abstention is not a final order and may not be reviewed until after final judgment. Accordingly, as a matter of appellate jurisdiction, the District Court's denial of *Colorado River* abstention, which is a discretionary decision in any event, *see id.* at 516, is not before this Court.

to require the District Court to reconsider *Colorado River* abstention. Instead, the Court should re-enter the stay of this appeal pending the outcome of the Delaware Case.

Respectfully,

/s/ James W. Quinn

Attachments

cc: (All w/attachments.)
Hon. Thomas L. Ambro (by FedEx through Clerk)
Hon. Julio M. Fuentes (by FedEx through Clerk)
Hon. Michael Chertoff (by FedEx through Clerk)
Gregory A. Castanias (by FedEx)
Kenneth R. Adamo/Michael W. Vary (by FedEx)
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December 18, 2003

VIA FEDERAL EXPRESS

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Re: ExxonMobil Corp. v. SABIC (No. 02-2130)

Dear Ms. Waldron:

At the conclusion of argument in the above-captioned case, which is referred to in the parties' briefs as the "NJ-II" matter, the panel (Ambro, Fuentes, and Chertoff, JJ.) requested that each party submit a letter brief of no more than 10 pages analyzing the Rooker-Feldman jurisdictional and Colorado River abstention issues presented by this case. Below is appellant SABIC's brief on these issues. Please distribute copies of this letter brief to Judges Ambro, Fuentes, and Chertoff.

* * *

The Foreign Sovereign Immunities Act (FSIA) and the Rooker-Feldman doctrine afford separate and independent bases for dismissing the NJ-II matter now, without remand,

because under either it is clear that subject-matter jurisdiction over the NJ-II suit is lacking. As SABIC's opening and reply FSIA briefs fully set out, subject-matter jurisdiction is lacking in NJ-II because (1) the ExxonMobil plaintiffs did not experience a direct and immediate loss in the United States; and (2) the FSIA only allows ExxonMobil to respond to SABIC's Delaware suit with counterclaims in the Delaware action (which ExxonMobil did); it does not allow ExxonMobil to file an entirely new lawsuit, the NJ-II action, on the same dispute. As set out in Part I below, subject-matter jurisdiction is also lacking under the Rooker-Feldman doctrine because ExxonMobil has conceded that it is maintaining its federal action for the sole purpose of relitigating its overcharge claims in the event that the Delaware Supreme Court reverses ExxonMobil's state-court jury verdict. Part II, below, further explains that, if this Court should hold that subject-matter jurisdiction is proper despite the FSIA and Rooker-Feldman problems with ExxonMobil's suit, it should remand the case with a direction that the district court consider staying this suit pursuant to the Colorado River abstention doctrine.

I. If The Court Rules That SABIC Is Not Immune From Suit Under The FSIA, This Court Should Dismiss Pursuant To The Rooker-Feldman Doctrine

If this Court determines that SABIC is not immune from suit under the FSIA, the Rooker-Feldman doctrine provides a separate and independent jurisdictional basis for dismissing ExxonMobil's suit. See, e.g., District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The Rooker-Feldman doctrine prevents lower federal courts from "sitting in direct review of the decisions of a state tribunal"—an action that would offend "the well-settled understanding that the Supreme Court of the United States, and not the lower federal courts, has jurisdiction to review a state court decision."

Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3d Cir. 2003) (internal citations and quotation marks omitted); accord, e.g., Guarino v. Larsen, 11 F.3d 1151, 1156-57 (3d Cir. 1993) ("District courts lack subject matter jurisdiction once a state court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts."). At oral argument, counsel for ExxonMobil admitted: (1) that its claims in this action are "essentially the same" as those already litigated in the Delaware Superior Court (Tr. 26; see also EB 21 (claims are "identical"))*; and (2) that ExxonMobil is maintaining its NJ-II federal suit solely as an "insurance policy" in the event that the Delaware Supreme Court were to reverse ExxonMobil's jury verdict (Tr. 28-29). These admissions make clear the Rooker-Feldman jurisdictional defect in ExxonMobil's claim.

A putative federal claim is barred by Rooker-Feldman under either of two circumstances: *First*, if the claim has been "actually litigated" in state court; or *second*, if the claim is "inextricably intertwined with adjudication by a state's courts," that is, "'[w]here federal relief can only be predicated upon a conviction that the state court was wrong.'" Parkview Assocs. P'ship v. City of Lebanon, 225 F.3d 321, 325 (3d Cir. 2000) (quoting Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989)). By ExxonMobil's own admission, *both* conditions are met here.

ExxonMobil conceded at argument that the overcharge claims that make up its federal cause of action are identical to those tried to judgment in the Delaware Superior Court. (See

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* The following conventions are used for citations throughout this brief: citations to SABIC's opening brief in appeal No. 02-2130 are "SB ___"; citations to ExxonMobil's brief in appeal No. 02-2130 are "EB __"; citations to the Joint Appendix in appeal No. 02-2130 are "A__"; and citations to the transcript of the December 9, 2003 oral argument are "Tr. ___".

Tr. 26; see also EB 21) Thus, these claims have been "actually litigated" because they were "present[ed]" to the Delaware Superior Court and "decid[ed]" by that court. Parkview Assocs., 225 F.3d at 325-26. Even if there were some minor difference between the claims brought in the federal court and those tried to judgment in Delaware—and ExxonMobil says there are none - the claims are, at the very least, "inextricably intertwined."

The slight wrinkle in the application of the Rooker-Feldman doctrine in this instance is that ExxonMobil prevailed on its claims in the Delaware Superior Court. Thus, at this moment in time, ExxonMobil is not asking a federal court to review (and potentially reverse) the Delaware judgment. This temporal wrinkle, however, does not preclude immediate application of the Rooker-Feldman doctrine. In this case, ExxonMobil has admitted that its sole reason for maintaining the federal action is as a sort of "insurance policy" in the event that the Delaware Supreme Court reverses the state-court jury verdict. (Tr. 28-29) Indeed, ExxonMobil stated that it would dismiss the federal claim if the Delaware Supreme Court affirms. (Tr. 27; see also EB 14 n.5) If the Rooker-Feldman doctrine bars a lower federal court from exercising jurisdiction where the *effect* would be direct review of a state-court decision (and it does), surely it bars ExxonMobil from maintaining a suit for the *sole and express purpose* of obtaining review of a state-court decision if and when that decision becomes adverse to ExxonMobil.

SABIC further notes that, as explained at argument, there is a distinct possibility that the Delaware Supreme Court will remand to the Delaware Superior Court for a reconsideration of SABIC's post-trial motions in light of a statement of Saudi Arabian law issued by the Saudi Arabian Government. (Tr. 10) If the Superior Court were to then reverse the jury verdict, a Rooker-Feldman problem would immediately arise because ExxonMobil would then necessarily be seeking

review of an adverse state-court decision in this federal action. Any ExxonMobil appeal to the Delaware Supreme Court would not eliminate the problem. "[T]he Rooker-Feldman doctrine applies with equal force when litigants seek federal review of the orders of lower state courts," even if those orders are the subject of an appeal in the state courts. Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. and N.J. Police Dep't, 973 F.2d 169, 177 (3d Cir. 1992); accord In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 140 (3d Cir. 1998).

At oral argument, ExxonMobil suggested that the Rooker-Feldman doctrine cannot apply to ExxonMobil Corporation because it is not a party to the Delaware action. (Tr. 26-27) This is wrong. It is true that the Rooker-Feldman doctrine does not extend to "persons not parties to the proceedings before the state . . . court." Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992); see Johnson v. De Grandy, 512 U.S. 997, 1006 (1994). But, as this Court has noted, this limiting principle derives from, and is co-extensive with, the "legal concepts of claim and issue preclusion." Valenti, 962 F.2d at 297. Claim and issue preclusion may be invoked against a party and those *in privity with* a party. See, e.g., Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 966 (3d Cir. 1991). Federal courts, including this one, repeatedly have held that parent corporations and their wholly owned subsidiaries are in privity for preclusion purposes, particularly when their interests are perfectly aligned in litigation. See, e.g., Lubrizol, 929 F.2d at 966; Doe v. Urohealth Sys., Inc., 216 F.3d 157, 162-63 (1st Cir. 2000); In re Imperial Corp. of Am., 92 F.3d 1503, 1507-08 (9th Cir. 1996). That is precisely the case here.

Exxon Chemical Arabia, Inc. ("ECAI") and Mobil Yanbu Petrochemical Co. ("Mobil Yanbu")—the ExxonMobil entities who are parties to the Delaware litigation and to the federal action—are each wholly owned subsidiaries of

ExxonMobil Corporation. (See SB 4-5) Furthermore, as ExxonMobil conceded at oral argument, all of its rights to recovery via the overcharge claims are derivative of ECAI's and Mobil Yanbu's ability to recover. (Tr. 33-34) Thus, ExxonMobil's interests vis-à-vis the overcharge claims are identical to those of ECAI and Mobil Yanbu, as ExxonMobil's counsel recognized at argument when he stated that "*we* can only collect the $417 million once." (Tr. 27 (emphasis added)) Moreover, the same attorneys representing ExxonMobil Corporation in the federal action represent ECAI and Mobil Yanbu in the Delaware action. There simply can be no serious debate that ExxonMobil Corporation is in privity with ECAI and Mobil Yanbu for purposes of claim and issue preclusion, and therefore is in privity with ECAI and Mobil Yanbu for purposes of the Rooker-Feldman doctrine.

In sum, this Court can, and should, dismiss this case now pursuant to the Rooker-Feldman doctrine. SABIC notes that this dismissal, like any dismissal for lack of subject-matter jurisdiction, would be without prejudice. See, e.g., Figueroa v. Buccaneer Hotel. Inc., 188 F.3d 172, 182 (3d Cir. 1999); Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3d Cir. 1980). Thus, if the Delaware Supreme Court ultimately reverses the state-court jury verdict on a ground that does not raise a Rooker-Feldman bar to federal jurisdiction, ExxonMobil could bring a new federal action at that time—assuming, of course, that no other jurisdictional impediment, such as claim or issue preclusion, existed. But given ExxonMobil's candid admission that it brought this federal action solely as a means of relitigating its overcharge claims if the Delaware Supreme Court reverses, this Court should dismiss this action without prejudice pursuant to the Rooker-Feldman doctrine.

II. Even If This Court Should Hold That Subject-Matter Jurisdiction Exists, Any Remand Should Be Accompanied With Instructions Directing The District Court To Consider A Renewed Motion To Stay The NJ-II Action Pursuant To The Colorado River Abstention Doctrine

In the event that this Court were to rule against SABIC on the FSIA and Rooker-Feldman issues, any remand to the district court should then direct the court to consider staying NJ-II pursuant to the Colorado River abstention doctrine.

As explained at oral argument (Tr. 4), SABIC originally moved before the district court in August 2000 to abstain under Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), with briefing on the matter completed in October 2000. The district court denied the motion as part of its April 3, 2002 order that also denied SABIC's motion to dismiss on FSIA grounds. (See A31-34 [SABIC v. ExxonMobil Corp., 194 F. Supp.2d 378, 411-14 (D.N.J. 2002)]) However, since the initial motion was made, much has changed—and dramatically so. *First*, ExxonMobil filed damages counterclaims in the Delaware action in January 2002; these counterclaims are, as ExxonMobil concedes, "identical" to the claims ExxonMobil brought in NJ-II. (EB 21) *Second*, ExxonMobil's counterclaims proceeded to a jury trial in March 2003, yielding a money judgment in ExxonMobil's favor in excess of $416 million. *Third*, the Delaware trial court denied SABIC's post-trial motions and, on September 2, 2003, entered a final judgment against SABIC, which is now on appeal to the Delaware Supreme Court. These dramatic changes now counsel strongly in favor of abstention pursuant to the Colorado River abstention doctrine.

Colorado River abstention "serve[s] the convenience of the federal courts" by "avoid[ing] duplicative litigation." 11A Wright & Miller, Federal Practice & Procedure § 4247

(2d ed. 1995). Simply put, it allows a federal court to stay an action where "there is a similar action pending in state court in which the controversy between the parties can be resolved." *Id.* The Colorado River analysis is two-tiered, focusing first on whether the "state action and the federal action[] are parallel." Spring City Corp. v. Am. Buildings Co., 193 F.3d 165, 171 (3d Cir. 1999). If so, the analysis turns to a balancing of a number of factors referred to in Supreme Court and Third Circuit cases:

> [1] "the desirability of avoiding piecemeal litigation";
> [2] "the order in which jurisdiction was obtained";
> [3] "whether federal or state law controls";
> [4] "whether the state court will adequately protect the interests of the parties";
> [5] "which court first assumed jurisdiction over property"; and
> [6] "the inconvenience of the federal forum."

Id. Notably, this list has expressly been recognized as not exclusive, and has been expanded by other courts on a case-by-case basis depending on the particular circumstances presented. See, e.g., Interstate Material Corp. v. City of Chicago, 847 F.2d 1285, 1288-89 (7th Cir. 1988). If, on balance, consideration of these factors favors the state forum, then the matter qualifies as an "exceptional case" that warrants the district court's stay of the federal proceeding. See, e.g., Vulcan Chemical Technologies, Inc. v. Barker, 297 F.3d 332, 341 (4th Cir. 2002).

Here, all agree that the NJ-II and Delaware matters are parallel. As ExxonMobil stated in its response brief to this Court, the two suits are "based upon precisely the same dispute" (EB 11) and raise "identical" claims (EB 21). Indeed, this is the very reason that ExxonMobil has repeatedly stated it will dismiss NJ-II should its $416 million verdict be affirmed in the Delaware matter. (See, e.g., Tr. 27; EB 14 n.5 (asserting that "ExxonMobil will dismiss NJ-II

once SABIC has exhausted its appellate rights in Delaware")) Moreover, as Judge Ambro correctly set out during argument, all of the Colorado River abstention factors either convincingly favor dismissal of NJ-II or are, at best for ExxonMobil, neutral. (Tr. 4-5)

Stay of NJ-II Would Avoid Piecemeal Litigation. This Court has admonished that the principal consideration under Colorado River abstention is the desirability of avoiding piecemeal litigation and, in particular, whether there is an "articulated congressional policy against piecemeal litigation in the specific context of the case under review." Ryan v. Johnson, 115 F.3d 193, 198 (3d Cir. 1997). This condition is unquestionably met here: Congress has made clear that district courts only possess original jurisdiction in civil disputes and may not—directly or in effect—review state-court final judgments. See, e.g., Rooker, 263 U.S. at 416. Were the district court to proceed with NJ-II at this juncture, the court would in effect be issuing interlocutory orders on issues of Saudi Arabian law and contract interpretation that would draw into question the Delaware Superior Court's final judgment. This would violate the congressional policy against federal-district-court review of state-court final judgments and, therefore, strongly counsels for stay of NJ-II upon remand.

Jurisdiction Was First Obtained in the Delaware Matter and That Case Has Proceeded to Final Judgment. The second Colorado River abstention factor likewise convincingly counsels for NJ-II's stay. This is particularly so given that this factor looks not only at the order in which the federal and state suits were filed, but also on "how much progress has been made in the two actions." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 21 (1983). Not only was the Delaware action filed weeks before NJ-II (see SB 8, 10), but the Delaware action has now proceeded through discovery, pre-trial motions practice, trial, post-trial

motions practice, entry of a final judgment, and is now pending on appeal to the Delaware Supreme Court. By contrast, discovery in NJ-II is not even complete and the case has been stayed pending the outcome of this appeal for over a year and a half. Given the relative progress of the two cases, there can be no doubt that this second factor strongly counsels in favor of a stay of NJ-II pursuant to Colorado River abstention.

Delaware Is Plainly An Adequate Forum to Protect Exxon-Mobil's Interests. With respect to the third factor, Exxon-Mobil cannot reasonably contend that its interests are being anything but fully protected in Delaware state court. Not only has ExxonMobil to date received a final judgment for over $416 million, but ExxonMobil itself has repeatedly sought to stay this appeal (and thus delay any further adjudication of the NJ-II action) while it pursues the Delaware case, making absolutely plain that ExxonMobil in fact *prefers* litigating this overcharge dispute in Delaware. ExxonMobil *chose* to go forward in Delaware. Because ExxonMobil has itself expressed an eagerness to pursue the Delaware action rather than NJ-II, the adequacy of Delaware as a forum is not in dispute and the third Colorado River factor counsels for a stay.

The Remaining Colorado River *Factors Are Neutral As to Federal or State Forum*. The remaining factors have no bearing on whether a NJ-II should be stayed because those factors have no application to the particular facts here. For example, this case does not involve "jurisdiction over property," nor does it involve questions of "federal or state law," as Saudi Arabian law controls the merits of the dispute.

Given that *all* of the Colorado River considerations either strongly favor a stay or are neutral, the NJ-II action is precisely the sort of exceptional case over which the federal district court should stay its hand. Accordingly, should this Court find that subject-matter jurisdiction exists despite the

FSIA and the Rooker-Feldman doctrine, then this Court should instruct the district court on remand to consider whether to stay the case under the Colorado River abstention doctrine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2003, a copy of SABIC's Letter Brief discussing Rooker-Feldman jurisdictional and Colorado River abstention issues was served, via United States first class mail, postage prepaid, upon each of the following:

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